INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and Rule involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	15

CITATIONS

CASES:

Atlantic Coast Line R. Co. v. *Mims*, 199 F. 2d 582	10
Blanco v. *United States*, 184 F. 2d 117	14
Boykin v. *Huff*, 121 F. 2d 865	11
Case v. *Bowles*, 327 U. S. 92	13, 14
Crutcher v. *Joyce*, 134 F. 2d 809	13
Dickinson v. *Petroleum Corp.*, 338 U. S. 507	11
Georgia Lumber Co. v. *Compania*, 323 U. S. 334	10
Hans v. *Louisiana*, 134 U. S. 1	13
Hoiness v. *United States*, 165 F. 2d 504, reversed, 335 U. S. 297	7, 8, 10, 11
Hunt v. *United States*, 278 U. S. 96	14
Indemnity Ins. Co. v. *Reisley*, 153 F. 2d 296, certiorari denied, 328 U. S. 857	10
Lemke v. *United States*, 203 F. 2d 406, pending on petition for ceriorari, No. 109, Oct. T., 1953	11
Martin v. *Clarke*, 105 F. 2d 685	10
Miller v. *Hatfield*, 309 U. S. 1	7
Milton v. *United States*, 120 F. 2d 794	10
Monaco v. *Mississippi*, 292 U. S. 313	13, 14
Newman v. *State of California*, 184 F. 2d 515	14
Preferred Insurance Co. v. *United States*, No. 13889, August 31, 1953	11, 12
Pyramid Motor Corp. v. *Ispass*, 330 U. S. 695	4
R.F.C. v. *Prudence Group*, 311 U. S. 579	11
Shannon v. *United States*, No. 11585, July 2, 1953 (C.A. D.C.)	4
Sobel v. *Diatz*, 189 F. 2d 26	10
Sun-Lite Awning Corp. v. *E. J. Conklin Aviation Corp.*, 176 F. 2d 344	11

Page

Tee-Hit-Ton Tribe v. *Olson*, 144 F. 2d 347 12
Turnbull v. *Cyr*, 184 F. 2d 117 14
United States v. *California*, 297 U. S. 175 ..... 13, 14
United States v. *California*, 332 U. S. 19 14
United States v. *Krause*, 197 F. 2d 329 4
United States v. *Louisiana*, 339 U. S. 699 14
United States v. *Oregon*, 295 U. S. 1 14
United States v. *Texas*, 143 U. S. 621 14
United States v. *Texas*, 339 U. S. 707 14
United States v. *Utah*, 283 U. S. 64 14
United States v. *Yellow Cab Co.*, 340 U. S. 543 13
Wilson v. *Southern Ry. Co.*, 147 F. 2d 165 11

CONSTITUTION AND STATUTES:

United States Constitution:
Art. III, Sec. 2 13
Eleventh Amendment 14
Act of September 24, 1789, 1 Stat. 73, 91 7
Act of May 24, 1949, 63 Stat. 89 9
Revised Statutes, Sec. 954 ..... 9, 10
28 U.S.C.:
Sec. 1251 13
Sec. 1291 ..... 3, 14
Sec. 2107 8
Sec. 2111 ..... 3, 9

MISCELLANEOUS:

16 *Cyclopedia of Federal Procedure* (3d ed.) p. 740 9

Federal Rules of Civil Procedure:

Rule 61 ..... 3, 9
Rule 73(g) 4

H. Rep. 308, 80th Cong., 1st Sess., p. A. 239 9

Report of the Judicial Conference of the United States and of Director of Admin. Office of U. S. Courts:

(1950), p. 136 15
(1951), p. 124 15
(1952), p. 120 15

In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 375

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF ARIZONA *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on June 30, 1953.

OPINIONS BELOW

The order of dismissal of the United States District Court for the District of Arizona (R. 11) is

not reported. The opinion of the Court of Appeals (R. 54-59) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 59). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On October 6, 1952, the District Court, acting on Arizona's motion to dismiss a third-party complaint filed by the United States, "Ordered that the Motion * * * be Granted" and "Further Ordered that this case be and it is dismissed" (R. 11). A notice of appeal from that order, filed on December 1, 1952, stated that the "United States * * * hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court entered on the 6th day of October, 1952, granting the Motion of the defendant State of Arizona to dismiss the Third-Party complaint against the Third-Party Defendants" (R. 12). The notice of appeal did not expressly state that the October 6th order, from which the appeal was taken, also dismissed the case.

The question presented is whether the omission of that express language from the notice of appeal justified the Court of Appeals' dismissal of the appeal.

STATUTES AND RULE INVOLVED

1. 28 U.S.C. 1291 and 2111 provide in pertinent part:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

2. Rule 61, Federal Rules of Civil Procedure, provides in pertinent part:

> * * * The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT

On December 6, 1951, the United States District Court for Arizona entered a judgment against the United States under the Federal Tort Claims Act in *Krause* v. *United States* for damages for per-

sonal injuries (R. 44-45).[1] The United States, in that same action, filed a third-party complaint against Arizona, seeking indemnity on the ground of the State's primary liability to the injured plaintiff (R. 3-7). The State moved to dismiss the complaint, contending that the district court lacked jurisdiction because (1) the Federal Constitution vests exclusive jurisdiction in the United States Supreme Court over controversies between the United States and a State, and (2) the United States had failed to comply with the conditions prescribed by the Arizona statute in waiving that State's immunity from suit (R. 8, 52-53).[2] In

---

[1] The Government's appeal from that judgment was dismissed by the Court of Appeals for the Ninth Circuit on the ground that the record on appeal had not been docketed within the time prescribed by Rule 73(g) of the Federal Rules of Civil Procedure. *United States* v. *Krause*, 197 F. 2d 329. The dismissal of that appeal, while not involved here directly, furnishes, we believe, an additional instance of rigid and technical use by the court below of its appeal dismissal power. The dismissal is in sharp contrast with the action taken by other Courts of Appeals, with the approval of this Court, in refusing to dismiss appeals for failure to docket on time, particularly where the appeal presents a substantial question as to the correctness of the district court judgment. *Pyramid Motor Corp.* v. *Ispass*, 330 U. S. 695, 704; *Shannon* v. *United States*, C.A. D.C., No. 11585, July 2, 1953.

[2] A memorandum filed by Arizona in support of its motion in the District Court argued that the Arizona Legislature had prescribed certain conditions upon which suit might be brought against the State, that the United States had not complied with those conditions, and that the District Court therefore lacked jurisdiction.

granting this motion, the District Court, on October 6, 1952 (R. 11):

> Ordered that the Motion of the Third-Party Defendants to dismiss the Third-Party complaint be and it is granted, and It is Further Ordered that this case be and it is dismissed without prejudice as to the Third-Party Defendants.

Within sixty days, on December 1, 1952, the United States filed the following notice of appeal (R. 12):

> Notice is hereby given that the United States of America, the cross-complainant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court entered on the 6th day of October, 1952, granting the Motion of the defendant State of Arizona to dismiss the Third-Party Complaint against the Third-Party Defendants.

This appeal was dismissed by the Court of Appeals, which held, Judge Pope dissenting, that there were two proceedings involved in the government's third-party action in the District Court against Arizona; that the first proceeding related to Arizona's motion to dismiss the third-party *complaint* and that the other "distinct * * * proceeding [was the dismissal of] the third party action of the United States initiated *sua sponte* by the district court"; that the notice of appeal re-

BLEED THROUGH POOR COPY

ferred to the order resulting from the "first proceeding to dismiss the *complaint*" (emphasis added), which is not final and therefore not appealable; and that the error of the notice of appeal in failing to describe in specific terms the "order" resulting from the "second ex parte proceeding" precluded appellate review (R. 54, 55). The majority opinion, concluding that "Arizona should not be deprived of the substantial right * * * arising from the error of the United States," accordingly dismissed the "attempted appeal from the order dismissing the third party complaint" (R. 56).

In his dissent, Judge Pope points out that there was "no such thing" as two proceedings or "two separate and distinct orders"; that the October 6th order "plainly is but one order"; that "obviously the appeal was directed at the dismissal of the case which was contained in, and a part of," the single October 6th order; and that "if the notice of appeal had merely referred to the order 'entered on the 6th day of October, 1952', and stopped there," even "the majority here would have found it hard to void the appeal" (R. 56, 57, 58). Judge Pope concluded that since the failure of the notice of appeal to describe the part of the order dismissing the case was at the most "an irregularity" and that since "no one has been misled or failed to understand what was intended" by the notice, the appeal should not have been dismissed (R. 58-59).

REASONS FOR GRANTING THE WRIT

The holding below, dismissing the Government's appeal because of a technical misstatement in its notice of appeal, calls for review and reversal by this Court in the exercise of its supervisory jurisdiction over the administration of justice in the federal courts. The holding is in square conflict with *Hoiness* v. *United States,* 335 U.S. 297, and flies in the face of this Court's express admonition to the court below for its "hypertechnical" conduct in dismissing the *Hoiness* appeal because of a similar technical defect. The need for review is underscored because the decision of the Court of Appeals seems to depart from well-settled law as to the finality and appealability of an order of dismissal of a complaint and subjects litigants to high risks in preserving appeal rights in a circuit noted for its very heavy governmental and private litigation.

1. The basic precept that courts must not be unduly technical at the expense of substantial justice was made a part of the statutory law of the United States as early as the First Session of the First Congress. Act of September 24, 1789, 1 Stat. 73, 91; see *Miller* v. *Hatfield,* 309 U.S. 1, 2. In *Hoiness* v. *United States,* 335 U.S. 297, this Court, relying on that precept, firmly reversed the Court of Appeals for the Ninth Circuit for dismissing an appeal because of a like technical defect in a notice of appeal. 335 U.S. 297, 301. In that case, two orders

had in fact been entered by the District Court: one on August 5 and another on October 14, 1946. The timely-filed notice of appeal referred only to the October 14th order. The Court of Appeals for the Ninth Circuit dismissed the appeal, holding that the earlier order, not described in the notice, was the appealable one and that the October 14th order was not appealable. 165 F. 2d 504. In reversing, this Court emphasized that (335 U.S. 297, 300-301):

> * * * although the petition for appeal referred solely to the second order and not to the first, that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R.S. § 954, 28 U.S.C. (1946 ed.) § 777.
>
> The mandate of that statute is for a court to disregard niceties of form and to give judgment as the right of the cause shall appear to it. It seems to us hypertechnical to say that the appeal papers did not bring the sole issue of the case fairly before the Court of Appeals.

In the instant case, the notice of appeal was filed within the 60-day period allowed by 28 U.S.C. 2107, referred expressly to the October 6th order, and was deemed defective, as Judge Pope pointed out, only because it mentioned part of the October 6th order, rather than the entire order or none of it

at all (R. 58). Certainly, this "defect was of such a technical nature" that dismissal of the Government's appeal because of that defect is at war with the *Hoiness* decision. [3]

Nor does the fact that R.S. § 954, relied on by this Court in the *Hoiness* case, was repealed in the 1948 revision of Title 28 of the United States Code minimize the conflict between *Hoiness* and the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of R.S. § 954 was "Covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H. Rep. 308, 80th Cong., 1st Sess., p. A. 239. The Federal Rules, including Rule 61 (*supra*, p. 3), are "part of the rules of [the Court of Appeals for the Ninth Circuit] with respect to appeals in actions of a civil nature." See the introductory paragraph to the Ninth Circuit's Rules (July 1, 1952), 16 *Cyclopedia of Federal Procedure* (3d ed.) p. 740. Furthermore, since the *Hoiness* decision, Congress has added Section 2111 to Title 28 of the United States Code. Act of May 24, 1949, 63 Stat. 89, 105. Section 2111 directs appellate courts, in language similar to that appearing in R.S. § 954 and Rule 61, to "give judgment after an examination of the record" without regard to technical "errors or defects which do

---

[3] Although the memorandum submitted by the United States to the court below stressed this Court's ruling in the *Hoiness* case, the opinion below wholly ignores that decision.

not affect" substantial rights. *Supra*, p. 3. The repeal of R.S. § 954 in no way, therefore, makes the *Hoiness* decision less controlling here.

Numerous other cases are in accord with the view, rejected by the majority of the court below, that a technical defect or omission in a notice of appeal should not be "seized upon * * * [as a] purely formal ground * * * [to] dismiss the appeal,"[4] where neither court nor appellee has been misled. Thus, the Court of Appeals for the Seventh Circuit, recognizing that courts must be "liberal in construing the sufficiency of a notice of appeal," has held that such a notice "ought not to be declared ineffectual because of some slight mistake in the description of the judgment." *Martin* v. *Clarke*, 105 F. 2d 685, 686. Similarly, the Court of Appeals for the Fifth Circuit, noting that "the Rules of Civil Procedure were adopted to abolish technicalities," overlooked, "in the interests of justice," the fact that a notice of appeal mistakenly referred to an order denying a motion for new trial rather than the final order in the case. *Milton* v. *United States*, 120 F. 2d 794, 796; Accord: *Indemnity Ins. Co.* v. *Reisley*, 153 F. 2d 296, 299 (C.A. 2), certiorari denied, 328 U.S. 857; *Sobel* v. *Diatz*, 189 F. 2d 26, 27 (C.A. D.C.); *Atlantic Coast Line R. Co.* v. *Mims*, 199 F. 2d 582 (C.A. 5). See also *Georgia Lumber Co.* v. *Com-*

[4] See Judge Healy's dissent in *Hoiness* v. *United States*, 165 F. 2d 504, 506, reversed, 335 U. S. 297.

pania, 323 U.S. 334; *R.F.C.* v. *Prudence Group,* 311 U.S. 579, 582; *Boykin* v. *Huff,* 121 F. 2d 865, 873 (C.A. D.C.); *Wilson* v. *Southern Ry. Co.,* 147 F. 2d 165 (C.A. 5); *Sun-Lite Awning Corp.* v. *E. J. Conklin Aviation Corp.,* 176 F. 2d 344, 345 (C.A. 4). The cited cases, as well as the *Hoiness* case, are in conflict with the instant decision which should therefore, we submit, be reviewed by this Court.[5]

In addition, such review is warranted by the intracircuit conflict with the very recent decision of a differently constituted bench of the same Circuit in *Preferred Insurance Co.* v. *United States,* No. 13889, C. A. 9, decided August 31, 1953. See *Dickinson* v. *Petroleum Corp.* 338 U.S. 507, 508. In the *Preferred Insurance Co.* case, the court (Healy, C. J., Orr, C. J., who concurred in Judge Denman's majority opinion in the instant case, and Mathes, D. J.), without any opinion or other attempt to avoid a conflict with the instant decision, sustained a notice of appeal which, like the one filed by the United States in the instant case, referred only to the granting of the motion to dismiss and which,

---

[5] *Lemke* v. *United States,* 203 F. 2d 406 (C. A. 9), pending on petition for certiorari, No. 109, Oct. T. 1953, involved an entirely different situation. At the time notice of appeal was filed in that case, no judgment from which an appeal could be taken had been entered. The dismissal of that appeal was therefore proper. See Brief in Opposition filed by the United States in the *Lemke* case, p. 8. In the instant case, the final judgment was actually entered on October 6, 1952, far in advance of the December 1 notice of appeal (R. 11-12).

also like the one filed here by the United States, failed to state in express language that the order appealed from actually dismissed the case.[6]

2. The apparent holding of the court below that a district court's order dismissing the complaint is never final and appealable but that only an order dismissing the case is appealable also constitutes serious error warranting review here (R. 54, 56).

There is no doubt that an order dismissing a complaint may properly be considered not final where that dismissal does not deprive plaintiff of the right to amend his complaint or an "opportunity to take further action." *Tee-Hit-Ton Tribe* v. *Olson*, 144 F. 2d 347 (C.A. 9). But it is equally

---

[6] We believe that the decision in the *Preferred* case is correct and for that reason no petition for rehearing *en banc* before the Court of Appeals for the Ninth Circuit has been filed by the Government.

In the *Preferred* case an order granting a motion to dismiss, and a separate order referring to the granting of the motion and actually dismissing the case, were entered on *different dates*. In the instant case, the majority opinion assumed the entry of two separate orders on the *same date*. But this difference is not substantial. For, even though two separate notices of appeal were filed in *Preferred*, the notice of appeal filed after dismissal of the case stated the correct date of the order of dismissal but described that order as one granting the motion to dismiss and failed to state that the order appealed from actually dismissed the case. It is that omission, of course, which the majority in the instant case relied on in dismissing the Government's appeal. It is that same omission which the court in the *Preferred* case properly disregarded.

clear that where the dismissal of the complaint is based on the district court's assumption that it has no jurisdiction over the parties or subject matter, so that under no state of facts would the suit be allowed to proceed, an order of dismissal of the complaint completely and finally determines the plaintiff's rights and is therefore appealable. *Crutcher* v. *Joyce*, 134 F. 2d 809 (C.A. 10). In the instant case, of course, the dismissal was based on such an assumption—*i.e.*, that the District Court lacked jurisdiction because only this Court has jurisdiction over controversies between the United States and a State and that, in any event, the State had not consented to be sued by the United States in the District Court. See *supra*, p. 4.[7]

---

[7] It is appropriate to note here that the District Court's dismissal for lack of jurisdiction completely ignores the well-settled doctrine that the grant of *original* jurisdiction to this Court by Article III, Section 2, of the Federal Constitution does not confer *exclusive* jurisdiction on this Court over suits by the United States against a State. *United States* v. *California*, 297 U. S. 175; *Case* v. *Bowles*, 327 U. S. 92, 97; see 28 U. S. C. 1251. There was no constitutional bar, therefore, to the District Court's exercise of jurisdiction over the third-party proceedings filed against Arizona by the United States under the Federal Tort Claims Act. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 552, 553.

Nor is there any merit to the suggestion that the District Court lacked jurisdiction because "Arizona has not consented" to the instant suit by the United States (R. 53). It is true that a State is immune from suit by its own citizens, by citizens of other States, and by foreign states, all of whom must obtain the consent of the State prior to bringing suit. *Hans* v. *Louisiana*, 134 U. S. 1; *Monaco* v. *Mississippi*, 292

Prior to the instant decision, the Ninth Circuit's rulings were in accord with the established rule that an order of dismissal of a complaint, finally determining the plaintiff's rights, is appealable. It was only where the order failed to dismiss the complaint but simply granted a motion to dismiss the complaint that the order was held not final within the meaning of 28 U.S.C. 1291, *supra*, p. 3, and hence not reviewable. *Turnbull* v. *Cyr*, 184 F. 2d 117 (C.A. 9). This was in line with the same distinction drawn by the Ninth Circuit between an order sustaining a motion to dismiss an action which was deemed nonreviewable and the order of dismissal of the action which was held reviewable. *Blanco* v. *United States*, 184 F. 2d 117 (C.A. 9); *Newman* v. *State of California*, 184 F. 2d 515 (C.A.

U. S. 313, 329; United States Constitution, 11th Amendment. But this immunity cannot be invoked with respect to suits filed against a State by the United States. The absolute right of the United States to sue an individual State "albeit without [its] consent * * * is inherent in the constitutional plan." *Monaco* v. *Mississippi*, 292 U. S. 313, 329. And the United States, in suits instituted by it against the individual States of the Union, has never sought their consent. See, *e.g.*, *United States* v. *Texas*, 339 U. S. 707, 709-710 (overruling a motion that Texas' refusal to consent to suit deprived the court of jurisdiction); *United States* v. *Louisiana*, 339 U. S. 699, 701-702 (rejecting a similar motion by Louisiana and refusing to reconsider *United States* v. *Texas*, 143 U. S. 621, 644, 645, where the Court, more than sixty years ago, had held that the United States could sue a State without the latter's consent); *United States* v. *California*, 332 U. S. 19; *Case* v. *Bowles*, 327 U. S. 92; *United States* v. *California*, 297 U. S. 175; *United States* v. *Oregon*, 295 U. S. 1; *United States* v. *Utah*, 283 U. S. 64; *Hunt* v. *United States*, 278 U. S. 96.

9). The opinion below, however, appears to abandon the distinction between an order granting a motion to dismiss and one of actual dismissal and seems to hold, instead, that an order dismissing the complaint is never final and reviewable but that only an order dismissing the case is appealable.

Even if that holding was not the one intended by the court below, the language in its opinion will, at the least, create considerable confusion within the Ninth Circuit as to the reviewability of an order of dismissal of a complaint. And the confusion, unless eliminated by this Court, will subject the Government and other litigants to unwarranted risks and possible forfeiture of appeal rights in a Court of Appeals which ranks second in total appeals handled and which hears a greater number of Government appeal cases than any of the other ten courts of appeals.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

ROBERT L. STERN,
Acting Solicitor General

September, 1953.

---

[8] 1952 Report of the Judicial Conference of the United States and of Director of Admin. Office of U. S. Courts, at p. 120; see also 1951 Report *id.* at p. 124; 1950 Report *id.* at p. 136.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—273155/P.O. 360